

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
GAINESVILLE DIVISION**

IN RE:	:	CASE NO. G04-30598-REB
	:	
ROBERT CONGER LOWELL,	:	
	:	
Debtor.	:	
	:	
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ELIZABETH JANE TYNES	:	ADVERSARY PROCEEDING
f/k/a ELIZABETH JANE LOWELL,	:	NO. 05-2014
	:	
Plaintiff,	:	
	:	
v.	:	
	:	CHAPTER 7
ROBERT C. LOWELL,	:	
	:	
Defendant.	:	JUDGE BRIZENDINE
	:	

**J U D G M E N T**

Before the Court is the complaint of Plaintiff to determine dischargeability of certain obligations arising in connection with the dissolution of a previous marriage between Plaintiff and Defendant-Debtor under 11 U.S.C. §§ 523(a)(15). This matter came on for trial on August 24, 2005. First, as provided in paragraph 6 of that certain Final Judgment and Decree of Divorce dated October 8, 2004 and entered in the Superior Court of Hall County, Georgia, in Civil Action File No. 02-CV-1946J, and styled *Elizabeth Jane Lowell v. Robert Conger Lowell*, Debtor is obligated to pay a certain credit card debt as owed on a Providian VISA account. Plaintiff claims said obligation of Debtor should be excepted from discharge under 11 U.S.C. § 523(a)(15).<sup>1</sup>

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<sup>1</sup> Once the creditor, Plaintiff herein, establishes that the debt in issue comes within this subsection as an obligation incurred in relation to a divorce situation, the burden of proof shifts to the Debtor to show that the debt is dischargeable as meeting the conditions of either

It appears to the Court, based upon the evidence presented at trial, that Debtor has the current ability to pay, at least on an installment basis, a total monthly amount between \$2,000.00 and \$2,250.00 on his nondischargeable obligations under the Divorce Decree, which would include this credit card obligation along with monthly child support of \$1,000.00 and his current monthly alimony payment of \$500.00, in addition to the other two nondischargeable obligations discussed herein. Said ability is conditioned on Debtor's continuing compliance with any and all requirements to ensure receipt of his monthly disability payments. It further appears that the benefit to Debtor in discharging said obligation does not outweigh the detrimental consequences to the former spouse (Plaintiff herein) and the children of the former marriage. Accordingly, for the reasons stated on the record, the Court finds and concludes that the obligation of Debtor to pay the Provident VISA credit card as provided in the Decree entered by the state court is excepted from discharge under 11 U.S.C. § 523(a)(15) and is, therefore, nondischargeable.<sup>2</sup>

Next, with regard to the counterclaim of Debtor herein to declare the obligation to pay attorney's fees of \$30,000.00 dischargeable under 11 U.S.C. § 523(a)(5), the Court denies said relief for the reasons stated on the record and finds that same are excepted from discharge. In awarding these fees to Plaintiff, the state court has already determined the need for this award

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subsection (a)(15)(A) or (a)(15)(B). *See In re Crosswhite*, 148 F.3d 879, 887-88 (7<sup>th</sup> Cir. 1998).

<sup>2</sup> It appears to the Court that based upon the testimony of Plaintiff Elizabeth Jane Tynes herein that the charges made on this credit card were for the support of the children at a time when Debtor was not paying the monthly alimony and child support required under the Consent Amended Temporary Order filed June 19, 2003. If Debtor pays the alimony owed in arrears and the credit card debt, it could possibly result in Debtor paying twice for the same support obligation. But, to the extent the obligation exists on the credit card and, if the state superior court intends that Debtor be required to pay both, the obligation is held to be nondischargeable under 11 U.S.C. § 523(a)(15).

and this Court agrees that such need existed and therefore concludes that same are in the nature of support and thus, nondischargeable. *See generally Robinson, et al. v. Robinson (In re Robinson)*, 193 B.R. 367 (Bankr. N.D.Ga. 1996) (Drake, B.J.).

Finally, concerning paragraph 4 of the state court Divorce Decree entitled “Spousal Support/Alimony,” the Court finds that the obligation described therein as “lump sum alimony in the amount of \$20,000.00 as compensation for [Plaintiff’s] interest in Horizon Vascular Surgery, P.C.” bears many of the traditional characteristics of a property settlement or equitable division of marital assets as opposed to being in the nature of support, especially as it is awarded as a discrete set of lump sum payments to be made “in recognition of the efforts of [Plaintiff] while working in the business without prior compensation.” Notwithstanding same, the state superior court made its intent known by specifically ruling after a bench trial that said “award is in the nature of support.” Yet, even though this statement by the state court is relevant to this Court’s determination under 11 U.S.C. § 523(a)(5) herein, such language is not dispositive as this Court is required to undertake an independent inquiry under federal law into whether the debt in question fits within the terms of this subsection. *See Tavella v. Edwards (In re Edwards)*, 172 B.R. 505 (Bankr. D.Conn. 1994).

Hence, this Court must carefully examine whether the award functions as alimony, maintenance, or support given the totality of the circumstances and facts presented in connection with the obligation at issue. Despite the presence of numerous factors indicating a property settlement, under the well-reasoned order in question, with a former spouse and four children of college-age or younger, coupled with Debtor’s \$240,000.00 annual salary at the time of the divorce, it appears that the state court ordered the lump sum payments at issue to address the

immediate support needs of Debtor's former spouse and their children given the difficult situation presented. Further, the Decree contains definitive divisions of marital property elsewhere in its provisions. Hence, consistent with the stated intent of the state court, this Court concludes that the obligation set forth in paragraph 4 of the Decree is in the nature of alimony, maintenance, or support and is, therefore, nondischargeable under 11 U.S.C. § 523(a)(5).<sup>3</sup>

Accordingly, based upon the foregoing discussion and for the reasons stated on the record on August 24, 2005, pursuant to Rule 52, Federal Rules of Civil Procedure, made applicable herein by Rule 7052, Federal Rules of Bankruptcy Procedure, it is

**ORDERED AND ADJUDGED** that **judgment** is entered in favor of Plaintiff Elizabeth Jane Tynes and against Defendant-Debtor Robert C. Lowell; and it is

**FURTHER ORDERED AND ADJUDGED** that the obligation owed to Providian VISA, which Debtor was directed to pay in connection with a certain Final Judgment and Decree of Divorce dated October 8, 2004 and entered in the Superior Court of Hall County, Georgia, in Civil Action File No. 02-CV-1946J and styled *Elizabeth Jane Lowell v. Robert Conger Lowell*, be, and hereby is, **excepted** from discharge and the dischargeability of same is denied by reason of 11 U.S.C. § 523(a)(15); and it is

**FURTHER ORDERED AND ADJUDGED** that the obligation of Debtor to pay certain attorney's fees in the sum of \$30,000.00 be, and hereby is, **excepted** from discharge and the

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<sup>3</sup> Given the specific facts of this case, as stated on the record this Court is heavily influenced by the expression of the state court judge's intent in connection with this award. Since the trial, however, the Court has further reviewed the applicable law and observes that the bankruptcy court judge still must analyze the nature of the disputed obligation under federal law beyond the characterization of same by a state trial court. Having performed such analysis, consistent with its prior ruling, the Court finds the award to be in the nature of necessary support for the Plaintiff and children of the former marriage.

dischargeability of same is denied by reason under 11 U.S.C. § 523(a)(5); and finally, it is

**FURTHER ORDERED AND ADJUDGED** that the obligation set forth in paragraph 4 of the Final Judgment and Decree of Divorce as entered by the state superior court for lump sum alimony in the amount of \$20,000.00 be, and hereby is, **excepted** from discharge and the dischargeability of same is denied by reason of 11 U.S.C. § 523(a)(5).

The Clerk is directed to serve a copy of this Judgment upon counsel for Plaintiff, counsel for Defendant-Debtor Robert C. Lowell, the Chapter 7 Trustee, and the U.S. Trustee.

**IT IS SO ORDERED.**

At Atlanta, Georgia this \_\_\_\_ day of September, 2005.

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ROBERT E. BRIZENDINE  
UNITED STATES BANKRUPTCY JUDGE